PREME COURT. U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 941

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. KAIMANA, her engines, etc., et al.,
Respondents.

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. LANAKILA, her engines, etc., et al.,
Respondents.

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. ALASKA BEAR, her engines, etc., et al.,
Respondents.

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. PACIFIC BEAR, her engines, etc., et al.,
Respondents.

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. COAST PROGRESS, her engines, etc., et al.,
Respondents.

Brief of Respondent Pacific Far East Line, Inc. (on behalf of *SS Kaimana, SS Lanakila, SS Pacific Bear* and *SS Alaska Bear*) in Opposition to Petition for a Writ of Certiorari

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Pacific Far East Line, Inc. (hereinafter respondent) as holder of preferred ship mortgages on *SS Kaimana, SS Lanakila* and

SS Pacific Bear, and as owner of *SS Alaska Bear* during the periods in which the debts which are sought in these actions to be charged as liens against the vessels accrued, opposes the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed in the above entitled cause.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals, not reported at the time the Petition was filed, is reported at 401 F. 2d 182.

STATUTES INVOLVED

With respect to the three cases in which respondent's status is that of holder of a preferred ship mortgage, Section 30 of the Ship Mortgage Act, 1920, 46 U.S.C. 953 (reproduced in the Appendix hereto) is directly involved in that only if the debts in question constitute "wages of the crew of the vessel" as this phrase appears therein can Petitioner prevail.[1]

QUESTIONS PRESENTED

1. Is the lien given by law to a seaman to secure payment of his wages enforceable by a non-seaman to collect non-wages?

2. Trusts having been established through collective bargaining to provide pension, vacation and welfare benefits to workers in the steamship industry, is the lien against a vessel which the law gives to a seaman to enforce collection of his earnings while serving thereon available to such a trust to enforce collection of amounts payable to the trust from an employer where (among other things):

(a) The payment of benefits to a worker is not dependent upon collection of the amounts due from his employer;

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1. With respect to the case in which respondent's status is that of vessel owner Petitioners also attempt to establish that the debts in question are or partake of the nature of wages due a seaman but no statutory language is involved.

(b) There is no identifiable connection between the benefits accruing to a worker and the amounts payable to the trust by his employer;

(c) Trust funds are used indiscriminately for the payment of benefits to persons who are not themselves entitled to a wage lien;

(d) All benefits due or to become due to all employees having claims against the trust, including those who served on the vessels in question, have been or will be paid in the ordinary course regardless of the outcome of these actions?

3. Will the intent of Congress in specifying in the Ship Mortgage Act, 1920 the rank which preferred ship mortgages shall enjoy in the hierarchy of maritime liens be subserved by permitting them to be outranked by debts of the kind here sought to be recovered?

4. If there is any doubt as to Question 3 should not resolution of the issue be left to the legislative process?

STATEMENT OF THE CASE

Former operators of the vessels involved failed to pay so-called "employer contributions" which they were obligated under collective bargaining agreements with the seagoing unions to pay to trusts established for the purpose of providing welfare, pension and vacation benefits to employees in the steamship industry. Being unable to collect such debts from these former operators because of their insolvency, the trusts (Petitioners herein) attempt by the instant actions to enforce collection by *in rem* proceedings against the vessels, alleging a right to assert a seaman's wage lien with the attendant priority over preferred ship mortgages afforded such liens by the Ship Mortgage Act of 1920.

Because the Petition fails to mention important characteristics of the trusts and of the debts sought to be collected, a brief recital of some of these characteristics is in order. Thus:

1. Contributions paid in by the employers are not credited to the accounts of particular workers but are intermingled and lose identity in the trust corpus.[2]

2. The amount of contribution accruing by virtue of the employment of a particular worker is not the amount that is eventually payable as a benefit to that worker—indeed, contributions may be payable by virtue of the employment of a worker who subsequently fails to qualify for benefits, as by not working a specified minimum period of time.[3]

3. The funds disbursed derive only in part from such contributions. A substantial portion of the trusts' income comes from extensive investment holdings, and some of the trusts provide for contributions from the employees as well as from the employers.[4]

4. Seamen are not the only recipients of the trusts' funds. Benefits are also paid to shoreside workers, such as union officials, personnel who administer the trusts, staffs of shore-based schools and recreational facilities, etc. Further, the expenses of administering the trusts (salaries, rentals, office equipment, legal and actuarial services, insurance and investment expenses, etc.) are all paid indiscriminately out of the trust corpus.[5]

5. The payment of benefits to seamen is guaranteed by Pacific Maritime Association,[6] which is an association of steamship companies operating from the Pacific Coast. Consistent therewith, the rate of contributions is recurringly increased (frequently retroactively) as required by actuarial predictions and increased benefits.[7]

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2. Record page 290, lines 8-13.

3. Rec. 289:11-14.

4. Rec. 277:20-25.

5. Rec. 288:24 to 289:10; Vessel Exhibit F 4:1 to 6:21; Vessel Exhibit G 3:27-4:6.

6. Transcript 31:2-3 and 19-21.

7. Rec. 284:11-16.

6. The trust documents explicitly provide that the individual beneficiaries have no right to collect the amounts due from the employers and no interest in the corpus of the trust.[8]

7. In eleven of the fifteen trusts the documents state:

> "[Employer] contributions to be paid into the fund shall not constitute or be deemed wages due to [employee]."[8]

8. It is stipulated that if any recovery is affected in the instant actions,

> "no part of the amount thereof will be distributed . . . to any individual beneficiary . . . but the amounts of such recovery will be added to the trust corpus."[9]

REASONS FOR DENYING THE WRIT

1. Previous denial of certiorari to consider the identical question.

Within the decade a series of cases was decided in the Fifth Circuit which Petitioners themselves do not attempt to distinguish and which denied seamen's wage lien status to delinquent employer contributions sought to be recovered by vacation, pension and welfare benefit trusts applicable to Gulf and Atlantic Coast Steamship operators. The first appellate decision was *Brandon v. S.S. Denton* (5 Cir. 1962) 302 F. 2d 404, followed in *Barnouw v. S.S. Ozark* (5 Cir. 1962) 304 F. 2d 717. Petition for certiorari in *Ozark* was denied (371 U.S. 923). Petitioner does not suggest what or why different considerations now apply.

2. The existing law is uniform.

Petitioner's precise contention has been rejected in the following decisions, additional to those of the courts below:

Brandon v. S.S. Denton (supra)

Barnouw v. S.S. Ozark (supra)

The Kingston (S.D. Texas) 1961 A.M.C. 1321 (Not reported in the Reporter System)

Irving Trust Company v. The Steamscrew Golden Sail, (D. Or. 1961) 197 F. Supp. 777

There are no decisions to the contrary.

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8. Vessel's Exhibit 2.
9. Rec. 290:8-13.

3. Only if the decision below was reversed would the question have importance.

(a) Under Existing Law:

No segment of society is descernibly affected by the result reached by the Court below. The workers will receive all benefits accruing from their labors because the integrity of the trusts is guaranteed by the entire industry. It might seem that those who provide this guarantee—viz., the employers as a group—would benefit if a delinquency of one of their members is recovered, and indeed the District Court below noted that the instant suits, rather than being for the benefit of the beneficiaries are "more for the protection of the other steamship companies against increase of their rate of compensation by reason of default of one or some of them." (Appendix to Petition, p. 9) However, there is no suggestion or indication in the record that the delinquencies here involved were a factor taken into account in establishing subsequent changes in employer contribution rates, and in view of the enormous sums passing into the trusts every year,[10] it is implausible that such was the case. Funds are regularly expended for purposes other than the payment of benefits[11] and it is more probable that a recovery in this case would merely increase the opportunity for extra-curricular activities. Nor, as a practical matter, is it likely that the situation will ever be otherwise, either with these particular trusts or any others.[12]

(b) If the Law Were Otherwise:

On the other hand, if Petitioner's position were sustained, serious consequences, adversely affecting important segments of so-

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10. $13,480,156.46 in 1960 (Vessel's Exhibit F 7:6) and many times that today.

11. In the case of one of the trusts the entire amount sued for is exceeded by the *annual* contribution to a school for seamanship.

12. It is to be more borne in mind that the trusts can at any time prevent the accrual of further delinquencies by refusing to furnish seaman to the errant operator.

ciety, would ensue. Banks and other mortgagees are not the only class concerned with the security value of vessels. Repairmen, suppliers, towers and others rely daily on the credit of a vessel available to them through the remedy of a proceeding *in rem* to enforce repairmen's and supplymen's liens. Buyers are also concerned with the possible existence of undisclosed liens. It has repeatedly been recognized that:

> "The maritime lien is a secret one. It may operate to the prejudice of prior mortgages or of purchasers without notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference." (*Piedmont & Georges Creek Coal Company v. Seaboard Fisheries Company,* 254 U.S. 1, 12 (1920). See also, *The Yankee Blade,* 19 How 82, 89 (1856); *Osaka Shosen Kaisha v. Pacific Export Lumber Company,* 260 U.S. 490, 499 (1923); *Plamals v. S.S. "Pinar Del Rio,"* etc., 277 U.S. 151, 156 (1928).)

In fact, since the particular lien claimed happens to be the one enjoying the highest priority of all, debts of the kind sought to be recovered here will, if Petitioner's position is sustained, outrank not only preferred ship mortgages and supply liens but other high priority liens, such as for general average, salvage, and taxes and will even compete for the mythical "last plank" with the wage earners themselves. Such a result would seriously disrupt accepted financial patterns.

4. The question is in any event properly one for legislative resolution.

The purpose of the Ship Mortgage Act of 1920 was to make ship mortgages desirable investments. See *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 39 (1934); *Gilmore & Black, The Law of Admiralty,* § 9-48. The "preferred ship mortgage" is thus a creature of Congress. If debts of the kind here involved are given the lien status enjoyed by a seamen's wage claim, they will outrank this Congressionally-created and Congressionally-favored

security interest. The wisdom of such a change should be evaluated by the legislative process rather than determined in *ad hoc* litigation between private disputants.

5. A result contrary to that below would be inconsistent with other decisions of this Court.

In *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) this Court held that employer contributions to an employee welfare fund of the type involved here are not "wages" for priority purposes under the Bankruptcy Act. *Joint Industry Board of the Electrical Industry, et al., v. United States,* 391 U.S. 224 (1967) found the same to be true of employer payments to an employees' annuity fund, even where the payments were credited to the account of each individual employee rather than (as in the case below) being intermingled and losing identity in a general fund.

It is not suggested that decisions on questions of bankruptcy law are necessarily determinative of analogous questions arising in the admiralty field. Nevertheless attributing wage lien status to debts of the kind here involved would be difficult to reconcile with *Embassy* and *a fortiori* with *Joint Industry Board of the Electrical Industry.*

6. Rule 23(4) of the Supreme Court Rules is applicable to the Petition.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition be denied.

Respectfully submitted,

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DORR, COOPER & HAYS

(Appendix Follows)

Appendix

Ship Mortgage Act, 1920 § 30

46 U.S.C. § 953:

953. Preferred maritime lien; priorities; other liens

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording an indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of cost, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of such a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in the amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, in the court. June 5, 1920, c. 250, § 30, Subsec. M, 41 Stat. 1004.